IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0806

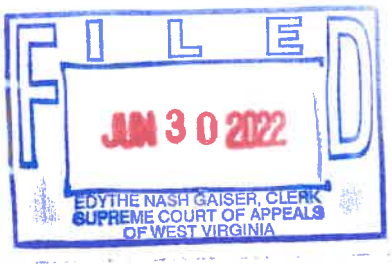
STATE OF WEST VIRGINIA,

Respondent,

v.

HENRY JO WARD,

Petitioner.



RESPONDENT'S BRIEF

Appeal from the September 29, 2021, Order
Circuit Court of Fayette County
Case No. 21-F-150

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TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Regulations

Rules

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF CONTENTS

INTRODUCTION

Respondent State of West Virginia, by counsel, R. Todd Goudy, Assistant Attorney General, responds to Henry Jo Ward's ("Petitioner") Brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error and, therefore, the circuit court's order should be affirmed.

ASSIGNMENTS OF ERROR

West Virginia Rule of Appellate Procedure 10(d) requires the argument section of the Respondent's brief to specifically respond to each assignment of error alleged by Petitioner. Petitioner, in violation of West Virginia Rule of Appellate Procedure 10(c)(3), does not present an Assignments of Error section in his brief. Instead, Petitioner's brief contains a Statement of Issues For Review raising four issues that would appear to be Petitioner's assignments of error. Petitioner's Brief (Pet.Br.) at 1. Petitioner's brief is internally inconsistent as the arguments addressed in the brief as the argument headings reference assignments of error that are not presented in Petitioner's Statement of Issues For Review or a defined Assignments of Error section. Pet.Br. at 9,13,18. The arguments within the body of Petitioner's brief are as follow:

I. The Facts Presented at the Petitioner's Trial Do Not Support a Conviction for Malicious Assault on a Law Enforcement Officer.

II. The Petitioner Suffered a Multitude of Violations of His Constitutional Protection Against Double Jeopardy.

III. The Trial Court Abused its Discretion by Favoring the State Throughout the Petitioner's Trial.

Id.

STATEMENT OF THE CASE

A. Procedural Background.

A trial on the merits of this case began on July 28, 2021 and concluded on July 29, 2021. Appendix Record (hereafter "A.R.") at 55, 205.

1. The Indictment below.

On May 12, 2021, the Grand Jury sitting for Fayette County, West Virginia handed down a nine-count Indictment against the Petitioner. A.R. at 581-585. The Grand Jury charged the Petitioner with Attempted Murder (Count One), Wanton Endangerment Involving a Firearm with regard to the alleged victim Coty Pierson (Count Two), Wanton Endangerment Involving a Firearm with regard to the alleged victim Jeffrey Barnhouse (Count Three), Malicious Assault on a Law Enforcement Officer with regard to the alleged victim Coty Pierson (Count Four), Use and Presentation of a Firearm During the Commission of a Felony in reference to Count One (Count Five), Obstructing an Officer (Count Six), Brandishing a Deadly Weapon (Count Seven), Trespassing (Count Eight), and Petit Larceny (Count Nine). *Id.*

2. Trial Evidence.

a. Summary of the Evidence.

The events of November 29, 2020 giving rise to the indictment began with the alleged theft of a hunting trail camera of Jeffrey Barnhouse. A.R. at 275. After reporting the theft to Department of Natural Resources Officer D. W. Hylton, Barnhouse contacted his cousin, Deputy Coty Pierson of the Fayette County Sheriff's Department. *Id.* Deputy Pierson was off duty at the time. A.R. at 348, 370. The two traveled to the Petitioner's camper, located on property adjacent to the hunting lease property where the camera was allegedly stolen. A.R. at 343.

After confronting the Petitioner about the allegedly stolen trail camera, the Petitioner became angry and a physical confrontation occurred with Deputy Pierson. A.R. at 353-355. During a second physical confrontation, the Petitioner produced a .357 Rossi pistol concealed in his back pants and fired one shot during a physical struggle with Deputy Pierson. *Id.* Deputy Pierson was injured as a result of the struggle. A.R. at 358.

The May 2021 Term of the Fayette County Grand Jury indicted the Petitioner as outlined *supra*. A.R. at 581-585. At the trial on the merits, numerous witnesses testified aside from Deputy Pierson and Mr. Barnhouse.[1] The Petitioner testified in his own defense. A.R. at 515-545.

b. Deputy Coty Pierson

Deputy Pierson testified that his second cousin, Jeffrey Barnhouse, contacted him in reference to a stolen trail camera. A.R. at 345. Barnhouse received a text picture from his stolen trail camera of an individual whom he believed was involved in the theft. A.R. at 346. Upon looking at the picture on Barnhouse's cell phone, Deputy Pierson immediately recognized the Petitioner. A.R. at 347. Deputy Pierson described the photo he saw on the cell phone as being clearer than the picture ultimately offered into evidence. *Id.* Deputy Pierson knew the Petitioner from prior law enforcement encounters. A.R. at 344. Further, Deputy Pierson noted that the Petitioner was wearing the same clothing that appeared in the cell phone photo. A.R. at 349.

[1] Kayla Krausman from the West Virginia State Police Crime Lab testified about testing the firearm and the results. A.R., 392-42. Vincent Travis Carte testified about the specifics of the hunting lease property and his observations during the shooting incident, although he was not a direct eye witness. *Id.*, 462-480. Deputy K. J. McClintic of the Fayette County Sheriff's Department testified to her observations of the Petitioner after responding to the shots fired call. *Id.*, 482-494. Federal Officer Matthew Jarvis testified to hearing the shots fired call in the aftermath of the shooting and responding to the Petitioner's residence. *Id.*, 495-501. Leonard Ramsey, the Petitioner's brother, testified that the two had been hunting earlier in the day. *Id.*, 504-505.

After identifying the Petitioner, Deputy Pierson and Mr. Barnhouse traveled to the Petitioner's residence in the Hico area of Fayette County to inquire about the stolen camera. A.R. at 343. Deputy Pierson parked his vehicle 100 to 200 yards away from the Petitioner's residence by a gate on the land located on Route 60. A.R. at 348-349. The Petitioner's residence was not visible from the main road. A.R. at 349. As Deputy Pierson and Barnhouse approached to within 40 yards of the Petitioner's camper, he exited and addressed Deputy Pierson as "Deputy Pierson." A.R. at 349, 379.

Upon questioning by the assistant prosecuting attorney, Deputy Pierson explained why he presented to the Petitioner's residence:

> Q: Okay. Why did you go right to the scene instead of waiting until the next time you were on the clock?
>
> A: The [inaudible] was so close I just figured that he would have gotten rid of the evidence before hand.
>
> Q: As a police officer you're on duty 24/7. Right?
>
> A: Yes, ma'am.

A.R. at 348. Further, Deputy Pierson testified, both on direct and cross-examination, that he traveled to the Petitioner's residence in civilian clothes, unarmed, no badge, and no handcuffs. A.R. at 350, 369. Once at the Petitioner's residence, Deputy Pierson testified that he confronted the Petitioner about stealing the camera and informed him that he appeared in a photo taken by the trail camera; at that point, the Petitioner started to become irate. A.R. at 351-352. Because of the escalating situation, Deputy Pierson physically detained the Petitioner, describing the process: "I leg sweeped him and got him on the ground and put my knees in his shoulder and sat there and told him to either chill out or I would sit there until an officer arrived." A.R. at 352.

Thereafter, the Petitioner asked to go to his truck to get a cigarette, which Deputy Pierson allowed. A.R., at 354. Deputy Pierson followed the Petitioner to his truck as he had seen a hunting rifle in the vehicle upon initially approaching the Petitioner's residence. *Id.* The Petitioner reached into the cab of the truck, reached over the hunting rifle and obtained a cigarette. A.R. at 354-355. At that point, the Petitioner leaned against the driver's seat of the truck and stated, "you're lucky you're still breathing that fucking badge don't scare me." A.R. at 355. At that point, Deputy Pierson saw the Petitioner "reach down his lower back and pull[] out the weapon." *Id.* Further, Deputy Pierson testified, "As the weapon was coming down, I could hear the cock on the gun and as it made it to my stomach I swarped it and it went off right beside me – in between me and Jeffrey Barnhouse." *Id.* Deputy Pierson, further, testified:

> "…I stepped to the side after hitting the gun. When it went off it kicked the barrel up into my hand and just instinct, I grabbed the barrel turned [the Petitioner] around and drove him into his truck. His right hand that had the gun was behind the driver's seat and the other portion of his body was in the front seat. So, we were fighting for the gun and Jeffrey Barnhouse comes over and puts both hands on the gun to help…and at that time I can see [the Petitioner] still trying to cock the gun or to pull the trigger because the barrel was pointing out at all of us. And I turned around and looked at…Barnhouse and advised him that we need to get the fucking gun or we're going to die."

A.R. at 357. Even though he fought against two individuals, the Petitioner attempted to grab the deer rifle located in the truck. A.R. at 359. Further, during the struggle, the "wheel of the revolver open[ed] and some bullets hit the floor in the back seat." *Id.* As a result of the struggle, Deputy Pierson was injured, receiving "metal shavings" in his hand. A.R. at 358.

During cross-examination, trial counsel for the Petitioner seemed to confirm that Deputy Pierson, while not on duty, presented to the Petitioner's residence in an official capacity. A.R. at 364, 370. Counsel asked:

Q: So you're there more or less in an investigative capacity.

A: Yes, sir.

A.R. at 364. Further during cross, Deputy Pierson confirmed he was on vacation at the time of the incident on November 29, 2020. A.R. at 370. Deputy Pierson had been on vacation since October 25, 2020 and was not expected back to work until December 6, 2020. *Id.* Trial counsel for the Petitioner seemed to attempt to question Deputy about the vacation when the State objected on relevancy grounds. *Id.* Defense counsel's stated purpose for the line of questioning was to establish whether "[the Petitioner] thought he was still a police officer or not." A.R. at 370. The circuit court sustained the State's relevancy objection finding that "it's been established that [Deputy Pierson] was not on duty...." *Id.* On re-direct examination, however, Deputy Pierson re-iterated that when the Petitioner initially exited his camper the Petitioner called him "Deputy Pierson." A.R. at 379. Petitioner's trial counsel did not object to the question. *Id.*

***c.* Jeffrey Barnhouse**

Testifying next on behalf of the State was Jeffrey Barnhouse. A.R. at 422-462. Mr. Barnhouse started his testimony by describing the hunting lease, specifically its location and his membership in it. A.R. at 423-424. Further, he described the purchase and loss of the trail camera he placed on the hunting lease property. A.R. at 424-425, 433-434. As Mr. Barnhouse had lost two previous trail cameras through unknown means, he took special precautions to hide and safeguard the latest camera by "put[ting] it on a small beech tree with leaves that's really brushy; it was really hard to see, you would have to spend some time trying to find it." A.R. at 425, 433-434.

From that point, Mr. Barnhouse began to describe the confrontation with himself, Deputy Pierson, and the Petitioner. Previously, Mr. Barnhouse stated he called Deputy Pierson upon learning his camera was missing "to see what I could do as far as trying to get my camera back."

A.R. at 428. Once the two made contact, Mr. Barnhouse showed the picture of the individual the camera transmitted to him. A.R. at 429-430. While Mr. Barnhouse did not recognize the individual, Deputy Pierson recognized the person in the photo as the Petitioner. A.R. 430.

Mr. Barnhouse's testimony corroborated Deputy Pierson's regarding the shooting. A.R. at 434-444. Mr. Barnhouse described feeling like "I had the law…on my side…I was there to let the law handle it." A.R. at 435. After confronting the Petitioner about the trail camera, the Petitioner's demeanor began to change once again seemingly for the worse as the Petitioner "lost all facial expression…lost all emotion…lost all care…. A.R. at 439. At that point, Mr. Barnhouse heard the Petitioner say to Deputy Pierson "that his badge doesn't scare him – that his badge does not intimidate him and he also says… he told Deputy Pierson that he was lucky to still be breathing." *Id.* Then, the Petitioner reached around his back and produced a pistol. A.R. at 440. Mr. Barnhouse heard the pistol "cock" and, as the Petitioner wielded the pistol around toward Pierson and Barnhouse, Deputy Pierson "smacked the gun away from him…." A.R. at 441. Mr. Barnhouse specifically testified, "When somebody cocks a pistol you know it." A.R. at 443. The pistol discharged and fired between Mr. Barnhouse and Deputy Pierson. *Id.*

After the shot, Mr. Barnhouse joined Deputy Pierson in attempting to wrest the pistol from the Petitioner. A.R. at 442. As the two wrestled with the Petitioner to try to disarm him, the Petitioner again attempted to "re-cock" the pistol. *Id.* At that point, the cylinder "fell out" of the pistol and "shells fell out." *Id.* At some point, Mr. Barnhouse and Deputy Pierson got the pistol away from the Petitioner, who then proceeded to "swing at Deputy Pierson," which proved unsuccessful. A.R. at 433. Later, after the physical struggle, Mr. Barnhouse learned of the injury to Deputy Pierson's hand. A.R. at 444.

d. The Petitioner.

After the State rested, the Petitioner testified in his own defense. A.R. at 514-544. The Petitioner admitted that he and his brother hunted on the day of November 29, 2020. A.R. at 515. He claimed that he and his brother decided to go look at a "ropes course" that was located adjacent to the Nuttall property. A.R. at 516. The Nuttal Property is the location of the hunting lease. *Id.* He denied seeing any "no trespassing" signs on that property on that day. A.R. at 517. Soon after returning to his camper at around 11:00 a.m., two men, whom the Petitioner claimed not to recognize, appeared and walked toward his camper. A.R. at 519-520. The Petitioner claimed that these individuals immediately approached him and "one of them got...literally right up within 6 inches of my face and started screaming that they had pictures of me on a trail camera and they know'd [sic] I took it and they wanted it back or I was going to jail." A.R. at 520. The Petitioner admitted that he knew the man yelling at him was Deputy Pierson and that he knew the officer from prior "altercations" where Pierson was the officer that responded. A.R. at 521. The Petitioner, further, testified that Deputy Pierson kept yelling at him about the trail camera and kept him from re-entering his camper on at least three occasions. A.R. at 522-523.

At some point, the Petitioner testified to going to his truck. A.R. at 525. He admitted at that time that he was armed with a "firearm." *Id.* The firearm was located in his lower back, tucked in his waistband. *Id.* Petitioner testified that Deputy Pierson kept yelling and screaming at him, calling him a thief and demanding information about the trail camera. *Id.* Then, the Petitioner admitted that he pulled the pistol out of his waistband. A.R. at 526. Further, the Petitioner admitted to threatening Deputy Pierson: "I told him doing stupid stuff like that you're lucky to still be breathing...." *Id.* The Petitioner claimed no recollection of the firearm discharging, but did not

dispute that "due to the evidence, yes, it did discharge." *Id.* Further, he claimed not to have "cocked" the hammer on the firearm, but that it must have gotten cocked during the struggle. A.R. at 526-527. Further, the Petitioner claimed to have "black[ed] out for a period of time," and also to have "lost consciousness" even though treating physicians later stated he suffered no injuries. A.R. at 528.

3. Conviction and Sentencing of the Petitioner.

On July 29, 2021, the petit jury seated to hear the trial in the matter below convicted the Petitioner on Counts One through Seven but acquitted the Petitioner on Counts Eight and Nine. A.R. at 144-145, 152-160. The circuit court memorialized the jury's verdicts by Order entered August 9, 2021. A.R. at 49-54. On September 10, 2021 the parties appeared before the circuit court for sentencing. A.R. at 24-47.

The circuit court sentenced the Petitioner as follows: an indeterminate term of not less than one nor more than three years on the conviction for Attempted Murder in the Second Degree in Count One; a determinate term of five years for the conviction of Wanton Endangerment in Count Two; a determinate term of five years and a fine of one thousand dollars ($1,000) for the conviction of Wanton Endangerment in Count Three; an indeterminate term of not less than three nor more than fifteen years for the conviction of Malicious Assault on a Law Enforcement Officer in Count Four; a determinate term of ten years for the conviction of Use and Presentation of a Firearm During the Commission of a Felony in Count Five; a term of one year on the conviction for the misdemeanor Count of Obstructing an Officer in Count Six; and an indeterminate jail term of not less than ninety days nor more than one year for the conviction of Brandishing in Count Seven. A.R. at 37-38. The sentences for the misdemeanor convictions in Counts Six and Seven were to run concurrently with one another and concurrent with the sentence for Count Five, Use

and Presentation of a Firearm During the Commission of a Felony. A.R. at 45. The sentences for the preceding felony convictions were to be imposed consecutively. *Id.* The circuit court, further, denied the Petitioner's request for the alternative sentence of probation. A.R. at 44-45. The circuit court memorialized its sentencing by Order entered September 29, 2021. A.R. at 18-23.

STANDARD OF REVIEW

"The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 2, State v. Georgius, 225 W. Va. 716, 696 S.E.2d 18 (2010) (quoting Syl. Pt. 1, in part, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997)).

"The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. Pt. 2, *State v. Harris*, 230 W. Va. 717, 742 S.E.2d 133 (2013) (quoting Syl. Pt. 10, *State v. Huffman*, 141 W. Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds*, *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994)).

"The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

"Double jeopardy claims are reviewed *de novo*." Syl. Pt. 1, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996).

"Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right—the failure to make timely assertion of the right—does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious." " Syl. Pt. 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

SUMMARY OF THE ARGUMENT

The Petitioner argue three assignments of error in his brief. In his first assignment of error, the Petitioner alleges that the evidence presented at the Petitioner's trial does not support a conviction for malicious assault on a law enforcement officer. Pet.Br.,at 9. The facts contained in the record and the relevant law, however, belie this assertion. The State produced more than enough evidence for the jury to find the Petitioner guilty. In his second assignment of error, the Petitioner alleged he suffered a multitude of violations of his constitutional protection against double jeopardy. Pet.Br. at 13. The Petitioner failed to object to this alleged error below and failed to argue plain error. This is fatal to his claims. Even if Petitioner's claims are not waived, the Petitioner's assertions still fail under *Blockburger*. In his final assignment of error, the Petitioner asserts that the circuit court abused its discretion by favoring the state throughout the Petitioner's trial. Pet.Br. at 18. The Petitioner, however, failed to present any evidence contained in the record or point to any relevant law showing evidence of bias or abuse of discretion by the circuit court.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary in this case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

ARGUMENT

A. There was sufficient evidence presented at trial support a conviction for Malicious Assault on a Law Enforcement Officer by a jury.

In his first assignment of error, the Petitioner alleges that the evidence presented at the Petitioner's trial does not support a conviction for malicious assault on a law enforcement officer. The record belies his assertion. Because the State produced enough evidence that the jury could make a finding of guilt, the circuit court must be affirmed.

1. The Petitioner's brief fails to comply with the West Virginia Rules of Appellate Procedure; thus, the offending assignments of error should be disregarded by this Court.

This Court has made clear on a number of occasions that the West Virginia Rules of Appellate Procedure must be followed. *See, e.g.*, Administrative Order, *Filings that do not comply with the rules of appellate procedure* (Dec. 10, 2012). In fact, the Rules of Appellate Procedure "are not mere procedural niceties; they set forth a structured method to permit litigants and this Court to carefully review each case." *Id.* Petitioner's brief does not comply with the Rules of Appellate Procedure. Therefore, his arguments should be wholly disregarded by this Court.

Pursuant to Rule 10(c)(3) of the West Virginia Rules of Appellate Procedure:

> The brief opens with a list of the assignments of error that are presented for review, expressed in terms and circumstances of the case but without unnecessary detail. The assignments of error need not be identical to those contained in the notice of appeal. The statement of the assignments of error will be deemed to include every subsidiary question fairly comprised therein. If the issue was not presented to the

> lower tribunal, the assignment of error must be phrased in such a fashion as to alert the Court to the fact that plain error is asserted. In its discretion, the Court may consider a plain error not among the assignments of error but evident from the record and otherwise within its jurisdiction to decide.
>
> Pursuant to Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure:
>
> [t]he brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error. The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

This Court has held true to that exacting standard, consistently refusing to address inadequately supported claims. Further, this Court stated:

> Rule 10 of the Rules of Appellate Procedure was designed to simplify the appeal process and to help lawyers file clear, concise, and organized briefs. "Although we liberally construe briefs in determining issues presented for review," *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996), we have often said that "a lawyer has a duty to plead and prove his case in accordance with established court rules." *State Dep't of Health v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995). Lawyers who fail to follow our appellate rules inevitably generate a disjointed, poorly written, or difficult to understand brief, and they should not anticipate that this Court will find or make their arguments for them....

Metro Tristate, Inc. v. Pub. Serv. Comm'n of W. Va., 245 W. Va. 495, 502, 859 S.E.2d 438, 445-46 (2021). "A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs." *State v. Day*, 225 W. Va. 794, 806 n.21, 696 S.E.2d 310, 322 n.21 (2010). Such cursory treatment of issues is insufficient to preserve the issue on appeal. *Id.*; *see also Johnson v. Garlow*, 197 W. Va. 674, 478 S.E.2d 347 (1996).

Nowhere in his brief does the Petitioner provide the appropriate standards of review for his assignments of error. Petitioner's argument contains only a sparse citations to the record, despite the fact that his argument leans heavily on very specific trial testimony. A.R. at 9-13. More

specifically, the Petitioner makes only unsupported, conclusory statements throughout without support in law or evidence from the record. *Id.*

Such whole cloth departure from the Rules of Appellate Procedure should not be tolerated by this Court because it violates the basic tenets of appellate practice and runs contrary to the very purpose of appellate review. *See generally State v. Hardin*, No. 21-0034, 2022 WL 163888, at *3 (W. Va. Supreme Court Jan. 18, 2022) (memorandum decision) (noting "that petitioner's argument as to this assignment of error is procedurally deficient as he fails to provide a single citation to the record in violation of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure"); *State v. Sites*, 241 W. Va. 430, 449, 825 S.E.2d 758, 777 (2019) ("We decline to address this inadequately briefed issue on the merits."), *cert. denied sub nom. Sites v. West Virginia*, No. 19-6068, 2019 WL 6257479 (U.S. Nov. 25, 2019); *State v. Benny W.*, 242 W. Va. 618, 632 n.23, 837 S.E.2d 679, 693 n.23 (2019) (recognizing the same); *State v. Back*, 241 W. Va. 209, 213 n.4, 820 S.E.2d 916, 920 n.4 (2018); *State v. Larry A.H.*, 230 W. Va. 709, 716, 742 S.E.2d 125, 132 (2013) (stating that a petitioner "must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment."); *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) ("Although we liberally construe briefs in determining issues presented for review, issues . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.").

Accordingly, this Court should disregard Petitioner's arguments for failure to comport with the Rules of Appellate Procedure and for failure to meet his burden of showing error. Should the Court determine that it will address the merits of the appeal, though, they are addressed below.

2. The evidence presented at trial supports convicting the Petitioner for Malicious Assault on a Law Enforcement Officer.

The Petitioner maintains that insufficient evidence existed for a jury to convict him of malicious assault on a law enforcement officer. Pet.Br. at 9. However, the record below belies this Assignment of Error.

a. Deputy Pierson was acting in his official capacity as a law enforcement officer at the time of the shooting.

Even though he presented to the Petitioner's residence in civilian clothes while on vacation, Deputy Pierson was acting in his official capacity at the time of the shooting. *Id.*, 348, 350, 369. This Court has held in Syllabus Point 4, in part, of *State v. Phillips*, 205 W. Va. 673, 520 S.E.2d 670 (1999): "It is general law that where a public peace officer, within his territorial jurisdiction, undertakes to discharge a duty which comes within the purview of his office, he is presumed to act in his official capacity...." Further, in Syllabus Point 5, the *Phillips* Court stated, "[a] municipal police officer on off-duty status is not relieved of his obligation as an officer to preserve the public peace and to protect the public in general pursuant to West Virginia Code § 8–14–3...."

The record clearly shows that all parties believed that Deputy Pierson appeared at the Petitioner's residence in his official capacity. In fact, Petitioner greets Pierson as Deputy Pierson, thereby acknowledging he knows that Pierson is a law enforcement officer. A.R. at 349, 379.

Deputy Pierson testified that his second cousin, Jeffrey Barnhouse contacted him in reference to a stolen trail camera. A.R. at 345. He testified that Barnhouse received a text picture from his stolen trail camera of an individual whom he believed was involved in the theft. A.R.at 346, 429-430. Upon looking at the picture on Barnhouse's cell phone, Deputy Pierson immediately recognized the Petitioner. A.R. at 347, 430. Mr. Barnhouse stated he called Deputy Pierson upon learning his camera was missing "to see what I could do as far as trying to get my

camera back." A.R. at 428. Pierson presented to the Petitioner's camper to aid in the investigation of the alleged theft and to preserve evidence. A.R. at 348.

Upon questioning by the assistant prosecuting attorney, and without objection by the Petitioner, Deputy Pierson explained why he presented to the Petitioner's residence:

> Q: Okay. Why did you go right to the scene instead of waiting until the next time you were on the clock?
>
> A: The [inaudible] was so close I just figured that he would have gotten rid of the evidence before hand.
>
> Q: As a police officer you're on duty 24/7. Right?
>
> A: Yes, ma'am.

A.R. at 348 During cross-examination, trial counsel for the Petitioner confirmed that Deputy Pierson, while not on duty, presented to the Petitioner's residence in an official capacity. A.R. at 364, 370. Petitioner's counsel asked:

> Q: So you're there more or less in an investigative capacity.
>
> A: Yes, sir.

A.R. at 364. Further, Mr. Barnhouse described feeling like "I had the law...on my side...I was there to let the law handle it." A.R. at 435. Moreover, the trial evidence shows that even the Petitioner thought that Deputy Pierson appeared at his residence in his official capacity, addressing him as "Deputy Pierson."A.R. at 349, 379. Though off-duty, Deputy Pierson still had the obligation to be under a duty "to act in [his] lawful and official capacity twenty-four hours a day." Syl. Pt. 5 (in part), *State v. Phillips*, 205 W. Va. 673, 520 S.E. 2d 670.

The only evidence the Petitioner points to that Deputy Pierson was not acting in his official capacity was that Pierson was in civilian clothes and on vacation. A.R. at 350, 369-370. Petitioner's argument, however, has no grounding in West Virginia law. According to *Phillips*, a

police officer retains his status "twenty-four hours a day," and retains that status "even in...private employment." *Phillips*, 205 W. Va. 703, 520 S.E.2d 670. Further, this Court had other opportunities to address the status of off-duty police officers. *See, e.g. State ex rel. State v. Gustke*, 205 W. Va. 72, 75,516 S.E.2d 283, 286 (1999)(DUI arrest by an off-duty, uniformed police officer deemed valid citizen's arrest); *Dale v. Odum*, 203 W. Va. 601, 609, 760 S.E.2d 415, 423 (2014)(DUI stop and arrest of individual valid in underlying DMV revocation proceedings); *State v. Willen*, 539 N.W.2d 650, 658 (Neb. 1995)("A police officer on 'off-duty' status is nevertheless not relieved of the obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general. Indeed, police officers are considered to be under a duty to respond as police officers 24 hours a day.").

To take the Petitioner's argument to its logical conclusion, FBI agents could never be considered "in official capacity" as they are not uniformed, off-duty EMS worker or police officers could never react to or assist in unexpected emergency matters involving loss of life or serious injury; or police officers could never react to unexpected criminal acts occurring in their presence to which they could reasonably respond. Implicit in the holdings of *Phillips*, *Gustke*, and *Odum* is that the status of the law enforcement officer is a key element. As long as the officer is, indeed, a police officer in good standing, he or she is acts in their "official capacity" when undertaking law enforcement activities while off duty. Syl. Pt. 5, *Phillips*, 205 W. Va. 673, 520 S.E.2d 670.

Keeping in mind the standard set forth in Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995):

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find

> guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

Petitioner's claim of insufficient evidence failed the moment he acknowledged Deputy Pierson as "Deputy." That provided the jury powerful evidence that the Petitioner recognized Deputy Pierson appeared at his camper as an officer in his official capacity.

As Deputy Pierson presented to the Petitioner's residence in his official capacity on the date of the shooting, the circuit court must be affirmed.

b. The circuit court below did not err in sustaining the State's objection to Petitioner's attempted questioning of Deputy Pierson's work status as it was irrelevant based on his previous testimony.

The circuit court did not err in sustaining the State's objection to the Petitioner's attempted cross-examination of Deputy Pierson's work status at the time of the shooting. Because the circuit court did not abuse its discretion, its decision must be affirmed. "The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. Pt. 2, *State v. Harris*, 230 W. Va. 717, 742 S.E.2d 133 (2013) (quoting Syl. Pt. 10, *State v. Huffman*, 141 W. Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds*, *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994)). Further, "the Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him...' " *Davis v. Alaska,* 415 U.S. 308 (1974)(internal citation omitted). In determining whether restrictions on cross-examination violate the Confrontation Clause, courts look at: (1) whether the excluded evidence was relevant; (2) whether there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and (3) whether the exclusion of

evidence left the jury with sufficient information to assess the credibility of the witness. *United States v. Larson,* 495 F.3d 1094, 1103 (9th Cir.2007).

During the Petitioner's cross-examination at trial, Deputy Pierson, confirmed he was on vacation at the time of the incident on November 29, 2020. A.R. at 370. Deputy Pierson stated he had been on vacation since October 25, 2020 and was not expected back to work until December 6, 2020. *Id.* Trial counsel for the Petitioner began to question Deputy about the vacation when the State objected on relevancy grounds. *Id.* Defense counsel's stated purpose for the line of questioning was to establish whether "[the Petitioner] thought he was still a police officer or not." The circuit court sustained the State's relevancy objection finding that "it's been established that [Deputy Pierson] was not on duty...." *Id.* Further, in his brief, Petitioner states, without support from the record, that Deputy Pierson's absence was due to "suspension." Pet.Br., 13 at n. 6. Yet, counsel for the Petitioner never stated he wanted to explore an alleged suspension, only that his question "ha[d] to do with whether my client thought he was still a police officer or not...[I]t was my understanding that he'd been off for some period of time[,] that's why I asked him." A.R. at 370.

Further, Petitioner's self-serving statement referencing Deputy Pierson's possible "suspension" in his brief is mere speculation and does not give rise to exculpatory evidence. Pet.Br. at 13 at n. 6. A claim under *Brady v. Maryland*, 373 U.S. 83 (1963) cannot be premised upon speculation. *State v. Willis*, No. 21-0389, 2022 WL 1694072 at *6 (W. Va. Supreme Court, May 26, 2022)(memorandum decision)(citing *State v. Shanton*, No. 16-0266, 2017 WL 2555734, *4 (W. Va. Supreme Court, June 13, 2017)(memorandum decision); *see also Banks v. Reynolds*, 54 F.3d 1508, 1518 (10th Cir. 1995) (" 'The mere possibility that evidence is exculpatory does not satisfy the constitutional materiality standard.' " (citations omitted)).

Once again, the clear evidence in this matter showed that the Petitioner thought that Deputy Pierson was a deputy and was there at his residence in his official capacity. Both Deputy Pierson and Mr. Barhouse testified that the Petitioner addressed Pierson as "Deputy Pierson" upon first exiting his residence. *See* A.R. at 349, 379, 434. Further, both Deputy Pierson and Mr. Barnhouse testified that Petitioner stated Pierson's badge "didn't scare him" and "he was lucky to still be breathing." *See* A.R. at 352, 355, 439.

The Petitioner's complaint that the circuit court's decision to stop his inquiry into Deputy Pierson's work status is a red herring; it was unnecessary to question him more on that issue and, therefore, it was the circuit court's duty to put a stop to it. According to this Court, any petitioner has a high burden to show any trial court abused its discretion in evidentiary rulings. The Petitioner failed to meet that high burden in the case at bar. As this Court has stated " '[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk,* 171 W.Va. 639, 301 S.E.2d 596, 599 (1983)(*overruled on other grounds by State v. Jenkins,* 191 W.Va. 87, 443 S.E.2d 244 (1994))." As Deputy Pierson previously testified he was on vacation, Petitioner's cross-examining him further on his work status was irrelevant. A.R. at 348, 350. The circuit court below had the duty to keep out irrelevant evidence. Syl. Pt. 2, in part, *State v. Harris*, 230 W. Va. 717, 742 S.E.2d 133. As the circuit court did not abuse its discretion in sustaining the State's objection to the Petitioner's line of questioning, its decision must be affirmed.

B. The Petitioner waived any claim of double jeopardy by not challenging the validity of the indictment or challenging the conviction.

The Petitioner, next, claims that he suffered multiple violations of his constitutional protection against double jeopardy. Pet.Br., at 13. Because the Petitioner cannot show prejudice in this regard, the circuit court must be affirmed.

1. The Petitioner waived any challenges to double jeopardy.

According to this Court, " '[o]ur general rule is that nonjurisdictional questions ... raised for the first time on appeal, will not be considered.' *Shaffer v. Acme Limestone Co., Inc.*, 206 W. Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999)." Further, in West Virginia, "parties must speak clearly in the [lower] court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996); *see also State v. Asbury*, 187 W.Va. 87, 91, 415 S.E.2d 891,895 (1992) (finding that "[g]enerally the failure to object constitutes a waiver of the right to raise the matter on appeal"). Counsel's failure to object forecloses appellate review of this issue, unless the circuit court's alleged error was plain error. *State v. Jeremy S.*, 243 W. Va. 523, 530, 847 S.E.2d 125, 132 (2020) (quoting *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995)). Further, this Court makes clear the distinction between waiver and forfeiture and the significance of both:

> "[T]he first inquiry under [Rule 52(b)[2] of the West Virginia Rules of Criminal Procedure] is whether there has in fact been error at all.... [D]eviation from a rule of law is error unless there is a waiver. Waiver ... is the ' "intentional relinquishment or abandonment of a known right." ' ... [W]hen there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law need not be determined."

See Miller, 194 W.Va. at 18, 459 S.E.2d at 129. Thus, under *Miller,* this Court does not proceed to determine the impact of the asserted error until there is a determination of waiver. On the other hand, only if this Court finds that a "forfeiture" has occurred, is plain error analysis applicable.

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[2] Rule 52 of the West Virginia Rules of Criminal Procedure holds:

> (a) Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Recently, in *United States v. Tipton,* 90 F.3d 861, 873 (4th Cir.1996), the Fourth Circuit Court of Appeals elaborated on the distinction:

> "But even where a right has not been waived, any entitlement to have error in its denial or abridgement corrected on appellate review may be forfeited by the 'failure to make timely assertion of [the] right' at trial. Such a forfeiture does not, as does waiver, extinguish the error, but it does impose stringent limitations, embodied in Rule 52(b), on the power of appellate courts to correct the error."

When a right is waived, it is not reviewable even for plain error. By contrast, the simple failure to assert a right by not objecting—forfeiture—is distinct from an intentional relinquishment—waiver. Only a forfeiture is reviewable under plain error. *See United States v. David,* 83 F.3d 638, 641 n. 5 (4th Cir.1996) ("[t]he important distinction between forfeiture and waiver is that if a defendant waives a right (which is waivable), he cannot later raise an objection on the grounds that the failure to provide him with the waived right is error")." To constitute waiver, a defendant must engage in an "intentional relinquishment or abandonment of a known right[.]" Syl. Pt. 6, in part, *Crabtree*, 198 W. Va. at 623, 482 S.E.2d at 608.

In his brief, the Petitioner alleged multiple double jeopardy violations. The double jeopardy violations alleged are 1) that convictions for wanton endangerment using a firearm and brandishing against Deputy Pierson merged, and therefore his sentences on each violates double jeopardy; and 2) conviction for use and presentation of a firearm during the commission of a felony based on the same evidence as same singular act as the other convictions. Pet.Br., 13-18. As previously stated, the nowhere in his brief did Petitioner indicate he preserved these alleged errors before the circuit court below either by contemporaneous objection at trial or by written motion pre- or post-trial. Further, nowhere in his brief does the Petitioner allege plain error in his argument in support of his claims of double jeopardy violations. Pet.Br. at 13-18. Based upon the Petitioner's inaction, he waived, abandoned, and relinquished all right to review of his alleged

assignments of error sufficiently. As this Court stated in *State v. McGlinton,* 229 W. Va. 554, 558, 729 S.E.2d 876, 881 (2012), this Court stated that "the defense of double jeopardy may be waived and the failure to properly raise it in the trial court operates as a waiver." *See also Adkins v. Leverette,* 164 W.Va. 377, 381, 264 S.E.2d 154, 156 (1980) ("we subscribe to the proposition, that jeopardy, having attached, may be waived by the defendant and in a subsequent timely trial on the same offense said defendant cannot successfully claim that he is being subjected to double jeopardy" (citation omitted)).

The Petitioner claims that the circuit court committed multiple double jeopardy violations but failed to recognize the substantial burden he carries: (1) to demonstrate his failure to object to the alleged violations, and (2) to argue plain error in his brief or preserve such claims. Pet.Br. at 13-18. The Petitioner has failed to carry his substantial burden of proving plain error.

"'One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result' in the imposition of a procedural bar to an appeal of that issue." *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995) (quoting *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir. 1994) (en banc)). Accordingly, "[w]hen a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time." *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996). "Of course, the raise or waive rule is not absolute." *LaRock*, 196 W. Va. at 316, 470 S.E.2d at 635. "The 'plain error' doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made." *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129.

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." W. Va. R. Crim. P. 52(b). Thus, "[t]he 'plain error' doctrine creates a limited exception to the general rule that a party's failure to object waives any right to appeal an issue." *Honaker v. Mahon*, 210 W. Va. 53, 60, 552 S.E.2d 788, 795 (2001). The plain error doctrine imposes a substantial burden on the Petitioner and this Court has been retrained in employing the doctrine..

"[C]ourts should use great caution when considering utilization of the plain error doctrine." *Brooks v. Galen of West Virginia, Inc.*, 220 W. Va. 699, 706, 649 S.E.2d 272, 279 (2007). "By its very nature, the plain error doctrine is reserved for only the most flagrant errors." *State ex rel. Games-Neely v. Yoder*, 237 W. Va. 301, 310, 787 S.E.2d 572, 581 (2016). "[I]t is only in rare cases that the plain error doctrine is invoked[.]" *Cartwright v. McComas*, 223 W. Va. 161, 165, 672 S.E.2d 297, 301 (2008) (per curiam); *see, e.g.*, *State v. Vance*, No. 21-0523, 2022 WL 1693662, at *4 (W. Va. May 26, 2022) (memorandum decision) (quoting 9 James Wm. Moore et al., *Moore's Federal Practice* ¶ 46.02[2] (3rd ed. 2002) (observing that plain error is rarely found).

In order "[t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The Petitioner has "'the burden of establishing entitlement to relief for plain error.'" *Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)). "That means that the defendant has the burden of establishing each of the four requirements for plain-error relief." *Id.* "Satisfying all four prongs of the plain-error test 'is difficult.'" *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)).

In the present case, the Petitioner fails to allege or argue plain error. Pet.Br. at 13-18. This is a fatal flaw in the Petitioner's Brief. West Virginia Rule of Appellate Procedure 10(c)(7) requires that "[t]he brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error." Therefore, the Petitioner's Brief must contain citation to pertinent legal authorities and apply that law to the facts of the case. Indeed, by Administrative Order entered December 10, 2012, this Court advised litigants and their counsel that "[b]riefs that lack citation of authority, *fail to structure an argument applying applicable law*, fail to raise any meaningful argument that there is error, or present only a skeletal argument" are not in compliance with this Court's rules. *Quoted in State v. Smith*, No. 16-0264, 2017 WL 785881, at *5 (W. Va. Mar. 1, 2017) (memorandum decision) (emphasis added). "If an appellant does not explain how its forfeited arguments survive the plain error standard, it effectively waives those arguments on appeal." *In re Rumsey Land Co.*, 944 F.3d 1259, 1271 (10th Cir. 2019); *see also State v. Erin S. T.*, No. 15-1195, 2016 WL 6819049, at *12 (W. Va. Nov. 18, 2016) (memorandum decision) ("On appeal, petitioner concedes that defense counsel failed to object to the admission of this evidence at the time it was presented and, in a footnote, states simply that 'this Court would review under a plain error standard.' However, petitioner fails to make any further argument in favor of plain error or to adequately brief the issue for our review. This Court has repeatedly cautioned that, in the absence of supporting authority, we will not further review alleged errors that have not been adequately briefed.").

Finally, this Court has recognized that "[t]he plain error rule presupposes that the record is sufficiently developed to discern the error." Syl. Pt. 7, in part, *State v. Spence*, 182 W. Va. 472, 388 S.E.2d 498 (1989). The Petitioner has provided no records to this Court from the circuit court

proceeding that support his claims that error occurred, much less that any alleged error otherwise satisfied the remaining prongs of the difficult to meet *Miller* plain error test. Therefore, plain error review is simply foreclosed. The Petitioner's omissions are fatal to his case and this Court should affirm the circuit court.

2. Should this Court determine the Petitioner's double jeopardy claim has not been waived, it still fails West Virginia Code § 61-2-10b different elements under *Blockburger*.

"To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." Syl. Pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996). Lastly, this Court, further held "[a]s a general rule, . . . errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there." Syl. Pt. 1, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998)(citing Syl. Pt. 17, in part, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974)).

It is indisputable that the Petitioner did not challenge the validity of the indictment or of the conviction for malicious assault on a law enforcement officer, wanton endangerment, and brandishing with regard to Deputy Pierson anywhere in the record. The Petitioner filed no motion pre-trial addressing any defect in the indictment as permitted by West Virginia Rule of Criminal Procedure 12(b)(2). *Id.* The Petitioner filed no post-trial motion to set aside any verdict he deemed defective or arrest judgment of the verdict as required by Rules 33 and 34 respectively. *Id.* The Petitioner did not request any specific jury instruction regarding lesser included offenses or object to any. A.R. at 57-69. Further still, the Petitioner did not address plain error for all unpreserved assignments of error and undertook no plain error analysis. By not addressing the convictions at issue in *any* meaningful way, the Petitioner "intentional[ly] relinquish[ed] [and] abandon[ed]" all

courses of relief available to him. Syl. Pt. 6, in part, *Crabtree*, 198 W. Va. at 623, 482 S.E.2d at 608. As the Petitioner clearly waived and relinquished his right to challenge his conviction, no error can be said to exist.

As in *McGlinton*, this Court must, now, determine whether convictions for malicious assault of a law enforcement officer, wanton endangerment, and brandishing offend double jeopardy as to whether or not the Legislature "intended the same conduct to be punishable under two criminal provisions...." *U.S.*; *State v. Zaccagnini*, 172 W. Va. 491, 308 S.E.2d 131 (1983)); *see also* Syl. Pt. 4, *Mirandy v. Smith*, 237 W. Va. 363, 787 S.E.2d 634 (2016) ("Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."). *Mirandy* made clear that "convictions of both wanton endangerment and malicious assault do not always constitute double jeopardy." *Id.* at 553, 490 S.E.2d at 640 (conviction for malicious assault of father and wanton endangerment of son); *but see State v. Wright*, 200 W. Va. 549, 554, 490 S.E.2d 636, 641 (1997)(wanton endangerment is a lesser included offense of malicious assault when only one victim involved; therefore convictions for both violate double jeopardy). The case at bar is distinguishable from *Wright* in that there was no waiver of his rights. As the Petitioner fail[ed] to properly raise the issue in the trial court operates as a waiver. *State v. McGlinton,* 229 W. Va. at 558, 729 S.E.2d at 881.

Further, Petitioner's double jeopardy claim fails as West Virginia Code § 61-2-10b contains an element different from malicious assault under West Virginia Code § 61-2-9. While *State v. Wright* held that wanton endangerment was a lesser included offense of malicious assault, West Virginia Code § 61-2-9 is not at issue here. West Virginia Code § 61-2-10b(b) states, in part:

> Any person who maliciously shoots, stabs, cuts or wounds or by any means causes bodily injury with intent to maim, disfigure, disable or kill a government

> representative, health care worker, utility worker, emergency service personnel, correctional employee or law-enforcement officer acting in his or her official capacity, and the person committing the malicious assault knows or has reason to know that the victim is acting in his or her official capacity is guilty of a felony....

West Virginia Code § 61-2-9(a) states, in part:

> If any person maliciously shoots, stabs, cuts or wounds any person, or by any means cause him or her bodily injury with intent to maim, disfigure, disable or kill, he or she, except where it is otherwise provided, is guilty of a felony

This Court has held "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Syl. Pt. 8, *State v. Zaccagnini*, 172 W.Va. 491, 308 S.E.2d 131. Not only does malicious assault of a law enforcement officer contain a different element that that of wanton endangerment, but also contains different elements than malicious assault: *a government representative, health care worker, utility worker, emergency service personnel, correctional employee or law-enforcement officer acting in his or her official capacity, and the person committing the malicious assault knows or has reason to know that the victim is acting in his or her official capacity* (emphasis added). As the elements in West Virginia Code § 61-2-10b are different, the Legislature created two distinct statutory provisions, separate and independent from each other.

Moreover, the Petitioner complains that the conviction for Use and Presentation of Firearm During the Commission of a Felony, West Virginia Code § 61-7-15a, also offends double jeopardy. In the indictment, the State charged the Petitioner with a violation of West Virginia Code § 61-7-15a in connection with the Attempted Murder count alleged in Count One. A.R. at 581-582. But, as previously noted, the Petitioner's claim fails. According to this Court, "[t]he test of *Blockburger v. United States*...is a rule of statutory construction. The rule is not controlling where there is a clear indication of contrary legislative intent." Syl. Pt. 6, *Mirandi v.* Smith, 237 W. Va.at 364, 787

S.E.2d at 635 (citing Syl. Pt. 5, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992)). As the Legislature clearly states in West Virginia Code § 61-7-15a, "As a separate and distinct offense, and in addition to any and all other offenses provided for in this code, any person who, while engaged in the commission of a felony, uses or presents a firearm shall be guilty of a felony....: Clearly, the Legislature intended West Virginia Code § 61-7-15a to be a separate and distinct crime. Therefore, the Petitioner's claim of double jeopardy violation fails.

Thus, the Petitioner's claims for violations of double jeopardy fails. The Petitioner cannot show plain error in this matter; thus, the circuit court must be affirmed.

C. The Petitioner's argument that the circuit court abused its discretion by favoring the State throughout trial is meritless.

Petitioner's final Assignment of Error is that the circuit court abused its discretion by favoring the State throughout the trial below. Pet.Br. at 18. Specifically, the Petitioner alleged the circuit court favored the State by: 1) being prejudiced in the jury selection process by the answer of a subsequently-struck juror regarding the good credibility of police officers in general; 2) a juror that did not hear the judge's instructions at the end of evidence; 3) refusal of the circuit court to allow a witness to testify to and "unidentifiable" photograph but not allow the jury to see said photo; 4) the circuit court's questioning of witnesses during trial; and 5) the circuit court's failure to *sua sponte* clear the courtroom of law enforcement officer-spectators from the courtroom during the trial. Pet.Br. at 18-20. As the Petitioner provided absolutely no legal analysis to support these claims, the circuit court must be affirmed.

1. This Section Petitioner's brief fails to comply with the West Virginia Rules of Appellate Procedure; thus, the offending assignments of error should be disregarded by this Court.

As in his first assignment of error, Petitioner has failed to adequately brief this assignment of error, making yet another "skeletal argument." *Day*, 225 W. Va. at 806 n.21, 696 S.E.2d at 322

n.21. Again, this is not enough to meet Petitioner's burden. *State v. Benny W.*, 242 W. Va. 618, 633, 837 S.E.2d 679, 694 (2019) (finding that the petitioner had failed to preserve his claim because his "skeletal" argument was unsupported by legal analysis and pertinent authorities."). Respondent reasserts its prior argument regarding the deficiencies of Petitioner's Brief.

Once again, nowhere in his brief does the Petitioner provide the appropriate standard of review for his assignments of error. Again, the Petitioner's argument contains only sparse citations to the record, despite the fact that his argument relies only on very specific trial testimony. *See* Pet.Br. at 18-20. More specifically, the Petitioner makes only unsupported, conclusory statements throughout without support in law or evidence from the record. *Id.* Moreover, the Petitioner cited to absolutely no case law or statute to support his argument. *Id.*

Accordingly, this Court should decline to address this assignment of error.

2. The Petitioner waived review of this assignment of error by not preserving the alleged error below.

As in his first assignment of error, Petitioner has failed to show where he preserved these alleged errors below by either contemporaneous objection, pre- or post-trial motions, or by failing to allege plain error in his brief. *See id.*, 18-20. "[P]arties must speak clearly in the [lower] court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." *State ex rel. Cooper v. Caperton*, 196 W.Va. at 216, 470 S.E.2d at 170; *see also State v. Asbury*, 187 W.Va. at 91, 415 S.E.2d at 895 (1992) (finding that "[g]enerally the failure to object constitutes a waiver of the right to raise the matter on appeal"). Respondent reasserts its prior argument regarding the waiver of review of claims.

Accordingly, this Court should decline to address this assignment of error and affirm the circuit court.

3. Should the Court deem it appropriate to address this Assignment of Error, the it still fails under a plain error analysis.

Should this Court deem it appropriate to address this Assignment of Error under a plain error analysis, the Petitioner's argument still fails. As the Petitioner cannot get around the waiver of his right to challenge any of the errors alleged during the trial below, the circuit court must be affirmed and the jury verdict must stand. Respondent reasserts its prior recitation of the appropriate legal standard regarding plain error.

Petitioner's claims of error as listed *supra* in this section are meritless. To start, the circuit court had no duty to *sua sponte* dismiss any juror for cause based upon an alleged answer regarding the good credibility of police officers in general. *See State v. Newcomb*, 223 W. Va. 843, 860-861, 679 S.E.2d 675, 693-694 (2009)(prospective juror's initial affirmative response to question during voir dire whether police officers' testimony should be more credible than non-police officer testimony did not automatically disqualify her from sitting on jury). Further, this Court made it clear that if a juror indicates plainly that he or she can serve without any bias or prejudice then it will not reverse a conviction based upon jury selection. See *Cowley*, 223 W. Va. 183, 189, 672 S.E.2d 319, 325 (finding that when "the juror acknowledged in clear and unequivocal terms that she could serve without any bias or prejudice" a claim of error was without merit). Further, "A trial judge is entitled to rely upon his/her self-evaluation of allegedly biased jurors when determining actual juror bias. The trial judge is in the best position to determine the sincerity of a juror's pledge to abide by the court's instructions. Therefore, his/her assessment is entitled to great deference." Syl. Pt. 6, *Thomas v. Makani*, 218 W. Va. 235, 624 S.E.2d 582 (2005) (internal quotation omitted) (quoting Syllabus Point 12, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998)). In sum, "[t]he true test to be applied with regard to [the] qualifications of a juror is whether a juror can, without bias or prejudice, return a verdict based on the evidence and the court's

instructions and disregard any prior opinions he may have had." *Newcomb*, 223 W. Va. at 859, 679 S.E.2d at 691 (internal quotations and citations omitted).

Nowhere in the record is there evidence that the Petitioner objected to these occurrences or requested removal of the juror in question. He can point to no actual prejudice and worse, provides no law to support his position. Further, the Petitioner could not show bias or prejudice stemming from a juror that allegedly did not hear jury instructions. *See City of Philippi v. Weaver*, 208 W. Va. 346, 350, 540 S.E.2d 563, 567 (2000) (Court found defendant waived error in regard to jury coercion by failing to object to juror who couldn't hear circuit court's question regarding the verdict and was prompted to say "guilty" during polling of verdict).

Next, the circuit court committed no error in allowing testimony regarding the allegedly blurry photograph. A.R. at 105-107. Petitioner's assertion has no support in law or in the record, however. The record indicates that the State laid a foundation and Officer Hylton testified to its authenticity. *Id.* Further, Petitioner's trial counsel did not object to the admission of the photograph or ask that it be published to the jury. A.R. at 107. Moreover, the circuit court was under no obligation to take any action on the photograph outside of admitting it as requested by the State. *See State v. Omechinski*, 196 W. Va. 41, 47, 468 S.E.2d 173, 179 (1996)(" Rule 105 of the West Virginia Rules of Evidence...mandates that curative, limiting, and cautionary instructions must be given upon *demand* of one of the parties.").

Next, the circuit court did not commit error by questioning two witnesses during trial. During the trial below, the circuit court asked the following questions of two witnesses. First, of Deputy Pierson:

> The Court: Pierson, in your direct testimony you indicated that you grabbed the barrel of this .357 Magnum; during cross-examination Mr. Moorehead has been referring to you hitting the .357 Magnum. So, which is it? Did you hit the gun with your hand, or did you grab the barrel with your hand?

....

The Court: Also, in your testimony you indicate that there were words between you and the defendant and then at some point he was taken to the ground and then I think that your words were that – after he chilled out you let him back up. Is that correct?

....

The Court: All right. Based upon you being involved in this, is it your impression that he had this weapon on him at the time he was backed up against the truck or did he retrieve it from the truck, or you don't know?

A.R. 382-383. Then of the Petitioner, the circuit court asked:

> The Court: Mr. Ward, there has been testimony by – in this case that you made a comment during this altercation at your camper trailer, whatever, -- that you made a comment toward Deputy Pierson to the effect that you're lucky to still be breathing. Did you make such a comment?
>
> ....
>
> All right. Tell me the context under which you told Officer Pierson that he was lucky to be breathing with treating people the way he has.

A.R. 543-544.

This Court has made plain that a trial court may, within its discretion, question witnesses during trial. "The plain language of Rule 614(b) authorizes trial courts to question witnesses-provided that such questioning is done in an impartial manner so as to not prejudice the parties. In applying the federal version of Rule 614(b)." *State v. Farmer*, 200 W. Va. 507, 513, 490 S.E.2d 326, 333 (1997); *State v. Holmes,* 177 W.Va. 236, 239, 351 S.E.2d 422, 426 (1986)(a trial judge is responsible to promote the ascertainment of truth when witnesses are examined); *see also United States v. Ostendorff,* 371 F.2d 729, 732 (4th Cir.)(the role of a judge is not to sit as "a bump on a log" or act as "a referee at a prizefight," but a judge has a duty to participate in witnesses examinations when it is necessary to expound upon matters not sufficiently developed by counsel.). "A trial judge, who is after all the only disinterested lawyer connected with the proceeding, has the duty to help make clear to the jury the facts and circumstances pertinent to the case." *Id.* The questioning undertaken by the circuit court in the trial below showed no favor to

any party. The questioning by the circuit court sought only to clarify the prior testimony of the two witnesses, Deputy Pierson and the Petitioner. A.R. at 382-383, 543-544. As the circuit court did not abuse its discretion, the Petitioner showed no prejudice or error.

Lastly, the circuit court was under no obligation to *sua sponte* clear the courtroom of police officer spectators. According to this Court:

> "A trial judge in a criminal case has a right to control the orderly process of a trial and may intervene into the trial process for such purpose, so long as such intervention does not operate to prejudice the defendant's case. With regard to evidence bearing on any material issue, including the credibility of witnesses, the trial judge should not intimate any opinion, as these matters are within the exclusive province of the jury."

Syl. Pt. 4, *State v. Burton,* 163 W.Va. 40, 254 S.E.2d 129 (1979). Further, with regard to closing court proceedings, the U.S. Supreme Court stated: "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller,* 467 U.S. 39, 45 (1984). "Such circumstances will be rare, however, and the balance of interests must be struck with special care." *Id. Waller* provided standards for courts to apply before excluding the public from any stage of a criminal trial: "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48.

Given this, the Petitioner showed no support for prejudice in the record. Petitioner made only conclusory statements, without support for law for fact from the record that the circuit court erred by not excluding the officers. After all, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their

responsibility and to the importance of their functions...." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 380 ((1979).

The circuit court committed no error. Therefore, Petitioner could not make that showing. No plain error exists.

CONCLUSION

For the foregoing reasons, the circuit court of Fayette County must be affirmed.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0806

STATE OF WEST VIRGINIA,

Respondent,

v.

HENRY JO WARD,

Petitioner.

CERTIFICATE OF SERVICE

I, R. Todd Goudy, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, June 30, 2022, and addressed as follows:

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